No. 22-11172

In the United States Court of Appeals for the Fifth Circuit

CORNELIUS CAMPBELL BURGESS,

Plaintiff-Appellee/Cross-Appellant,

v.

JENNIFER WHANG, In her official capacity as an Administrative Law Judge; FEDERAL DEPOSIT INSURANCE CORPORATION; MARTIN J. GRUENBERG, In his official capacity as Acting Chairman of the FDIC; MICHAEL J. HSU, In his official capacity as a Director of the FDIC; ROHIT CHOPRA, In his official capacity as a Director of the FDIC,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Northern District of Texas

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: November 21, 2024

/s/ Brianne J. Gorod
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

	Page
SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	6
I. Congress Can Assign Adjudication of Claims to Executive Agencies When They Are Operating in an Area Where Government Control Is So Total that There Is No Vested Right to Participate	6
II. The Supervision of Federally Insured Banks Is an Area Where Government Control Is So Total that There Is No Vested Right to Participate	11
III. The FDIC's Imposition of Penalties and Other Orders on Banks and Bankers Does Not Require Adjudication by an Article III Court	21
CONCLUSION	25
CERTIFICATE OF SERVICE	1A
CERTIFICATE OF COMPLIANCE	2A

TABLE OF AUTHORITIES

Page(s)

Cases

Akin v. Off. of Thrift Supervision Dep't of Treasury,
950 F.2d 1180 (5th Cir. 1992).. 23

Decatur v. Paulding,
39 U.S. 497 (1840).. 9, 17, 21

Ex parte Bakelite Corp.,
279 U.S. 438 (1929).. 8, 9

Fahey v. Mallonee,
332 U.S. 245 (1947).. 1, 23

FDIC v. Phila. Gear Corp.,
476 U.S. 426 (1986).. 16

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,
458 U.S. 141 (1982).. 1

Gulf Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.,
651 F.2d 259 (5th Cir.1981).. 21

Horne v. Dep't of Agric.,
576 U.S. 350 (2015).. 10, 23

Murray's Lessee v. Hoboken Land & Improvement Co.,
59 U.S. 272 (1856).. 6, 7

Oceanic Steam Navigation Co. v. Stranahan,
214 U.S. 320 (1909).. 7-9, 12, 15

Schaake v. Dolley,
118 P. 80 (Kan. 1911).. 12

SEC v. Jarkesy,
144 S. Ct. 2117 (2024).. 2-9, 11, 21-24

Spawn v. W. Bank-Westheimer,
989 F.2d 830 (5th Cir. 1993).. 2, 22

TABLE OF AUTHORITIES – cont'd

Page(s)

Stern v. Marshall,
564 U.S. 462 (2011) 7

Thomas v. Union Carbide Agric. Prods. Co.,
473 U.S. 568 (1985) 4, 5, 9-11, 23, 24

United States v. Phila. Nat. Bank,
374 U.S. 321 (1963) 1, 2

Constitutional Provisions, Statutes, and Legislative Materials

Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 13

Banking Act of 1935, Pub. L. No. 74-305, 49 Stat. 684 .... 13, 14

79 Cong. Rec. 11,776 (1935) 14, 15

112 Cong. Rec. 24,983 (1966) 22

Federal Institutions Reform, Recovery, and Enforcement Act of 1989,
Pub. L. No. 101-73, § 204, 103 Stat. 183 (1989) 20

Financial Institutions Regulatory and Interest Rate Control Act of 1978,
Pub. L. No. 95-630, § 107, 92 Stat. 3641 19

Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695,
80 Stat. 1028 .... 3, 18

H.R. Rep. No. 95-1383 (1978) 19

H.R. Rep. No. 101-222 (1989) 20

S. Rep. No. 89-1482 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3532 18

12 U.S.C. § 1818 22

12 U.S.C. § 1818(b) 23

12 U.S.C. § 1818(h)(1) 3

12 U.S.C. § 1823(a)(2) 4

TABLE OF AUTHORITIES – cont'd

Page(s)

U.S. Const. art. I, § 8, cl. 5 3

Books, Articles, and Other Authorities

1 *Annual Report of the Comptroller of the Currency* (1892) 17

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Lawrence G. Baxter, *Fiduciary Issues in Federal Banking Regulation*, 56 Law & Contemp. Probs. 7 (1993) 2, 13, 23

Gerald Corrigan, *Are Banks Special?*, Minneapolis Fed. Rsrv. Bank (Jan. 1, 1982) 15

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Mark D. Flood, *The Great Deposit Insurance Debate*, 74 Fed. Rsrv. Bank St. Louis Rev. 51 (July 1992) 3, 4, 15, 16

Alexander Hamilton, *Report of the Secretary of the Treasury on the Subject of a National Bank* (1790) 3, 12, 22

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC also works to improve understanding of the Constitution and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Banking is "one of the longest regulated and most closely supervised of public callings." *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947). Federal agencies "maintain virtually a day-to-day surveillance of the American banking system," *United States v. Phila. Nat. Bank*, 374 U.S. 321, 329 (1963), supervising the nation's federally insured banks from the "cradle to [the] corporate grave," *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 145 (1982).

The Federal Deposit Insurance Corporation (FDIC), which was created in the aftermath of the bank failures of 1929 and the resulting Great Depression, has especially "formidable power" over federally insured banks, including the power to

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

essentially terminate a bank's business by revoking its insurance. *Phila. Nat. Bank*, 374 U.S. at 329-30. Federally insured banks submit to this supervision voluntarily, in exchange for the "benefit" of insurance protection—a significant "commercial advantage." Lawrence G. Baxter, *Fiduciary Issues in Federal Banking Regulation*, 56 Law & Contemp. Probs. 7, 23 (1993). For years, the FDIC's supervision has been "one of the most successful," if not the "most successful," "systems of economic regulation," *Phila. Nat. Bank*, 374 U.S at 330, contributing to the "sound, effective, and uninterrupted operation of the banking system," *Spawn v. W. Bank-Westheimer*, 989 F.2d 830, 837 (5th Cir. 1993).

Despite this nearly century-long history, Burgess argues that the Supreme Court's recent decision in *SEC v. Jarkesy* requires this Court to invalidate some of the FDIC's core supervisory powers—specifically, its ability to issue penalties and orders prohibiting individuals from further participation in the banking industry. Not so. In *Jarkesy*, the Supreme Court held that the Seventh Amendment entitles defendants to a jury trial when the Securities Exchange Commission (SEC) seeks civil penalties for securities fraud. *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024). But the Court also reaffirmed that in "some contexts" the government may seek traditional legal remedies and "extract civil penalties" in administrative tribunals. *Id.* at 2134 n.2. Under the Court's "public rights doctrine," if an agency's action falls within an area of unique and exclusive government power or stems from a

"historical practice" of agency adjudication, then "no involvement by an Article III court in the initial adjudication is necessary." *Id.* at 2150, 2132.

The regulation of federally insured banks is an area in which the power of the "political branches" is long-standing and Article III courts have traditionally not been involved, making the public rights doctrine applicable. *Id.* at 2129, 2133. As an initial matter, unlike the penalties at issue in *Jarksey*, the FDIC's penalties have always been the subject of administrative proceedings—the agency has never had the legal authority to obtain civil penalties in federal court. *See* 12 U.S.C. § 1818(h)(1); Pub. L. 89-695, § 202, 80 Stat. 1046, 1051 (1966) (creating § 1818(h)(1)); *cf. Jarkesy*, 144 S. Ct. at 2126 (emphasizing that until 2010, Congress permitted the SEC to bring securities fraud claims *only* in federal court).

Additionally, the FDIC's regulation of insured banks involves distinct "governmental prerogatives." *Id.* at 2127. Congress created the FDIC and passed related legislation, relying in part on its power to "regulate the [v]alue" of money, U.S. Const. art. I, § 8, cl. 5, because it recognized that deposit insurance was necessary to "stabilize the medium of exchange" and promote "sound currency," Mark D. Flood, *The Great Deposit Insurance Debate*, 74 Fed. Rsrv. Bank St. Louis Rev. 51, 66 (July 1992). Like many of their forebears, these lawmakers understood that banks exercised a "right on behalf of the government." Alexander Hamilton, *Report of the Secretary of the Treasury on the Subject of a National*

Bank 35 (1790); Flood, *supra*, at 66 (describing the view that federally insured banks "serve[d] the public" (quoting Rep. Henry Steagall)).

In other words, the FDIC does not simply regulate "transactions between private individuals interacting in a pre-existing market," *Jarkesy*, 144 S. Ct. at 2136; rather, it regulates and insures banks as part of its responsibility to safeguard the stability of the nation's currency and financial system. These supervisory powers enable it to protect the assets of its insurance funds—public funds whose investment is subject to the approval of the Secretary of the Treasury, *see* 12 U.S.C. § 1823(a)(2), and "ultimately backed by the full faith and credit of the United States government," FDIC Supp. Br. 26 (internal quotations omitted)—making doubly clear that such supervision is a unique executive function to which the public rights doctrine applies.

Moreover, the federal deposit insurance scheme is akin to the types of voluntary programs to which the Court has applied the public rights doctrine in the past, recognizing that where participation in such a program is voluntary, there is no "purely 'private' right" at issue, and "Article III adjudication" is unnecessary. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (holding that a law requiring pesticide manufacturers to settle valuable claims outside of an Article III court was constitutional because manufacturers' participation in the program was voluntary and thus no "purely 'private' right" was

involved). Significantly, Congress does not require state-chartered banks like Burgess's to acquire deposit insurance. Instead, bankers like Burgess, recognizing the value of deposit insurance, are willing participants in a scheme in which banks receive those critical federal benefits under strictly controlled circumstances. To facilitate the conferral of this public right, Congress has directed the executive to "administer[] a complex regulatory scheme to allocate costs and benefits among voluntary participants." *Id.* at 589. In this context, Congress can permit the assessment of penalties without "providing an Article III adjudication." *Id.*

To be sure, courts must analyze each invocation of the public rights doctrine with "close attention," to ensure that the exception does not "swallow the rule." *Jarkesy*, 144 S. Ct. at 2134. The FDIC's assessment of penalties to protect the economy and maintain the soundness of its insurance funds, which stems from a voluntary program and a "historical practice" of FDIC regulation of federally insured banks and bankers, *id.* at 2132, is the paradigmatic context in which the public rights doctrine should apply. There is no danger of the exception swallowing the rule here, and the exercise of the FDIC's supervisory authority does not require adjudication by Article III courts.

ARGUMENT

I. Congress Can Assign Adjudication of Claims to Executive Agencies When They Are Operating in an Area Where Government Control Is So Total that There Is No Vested Right to Participate.

As the Supreme Court long ago explained, "private right[s]" must be adjudicated in "the common law, . . . equity, or admiralty" courts, while Congress can provide for "matters . . . involving public rights" to be resolved in other forums. *Murray's Lessee v. Hoboken Land & Improvement Co*., 59 U.S. 272, 284 (1856). As the Court recently reiterated in *Jarkesy*, the public rights doctrine applies when Congress's power over an area is so exclusive that no vested rights are involved, such as when it distributes privileges or licenses to voluntary participants. 144 S. Ct. at 2132 (citing *Murray's Lessee*, 59 U.S. at 284).

In *Jarkesy*, the Supreme Court considered a Seventh Amendment challenge to a provision permitting the Securities and Exchange Commission (SEC) to seek civil penalties before administrative law judges. *Id*. at 2127. The Court first determined whether the SEC's action "implicate[d] the Seventh Amendment," or, in other words, if the SEC's claim was "legal in nature." *Id.* at 2128-29. Determining whether a claim is legal, the Court explained, requires consideration of "the cause of action and the remedy it provides," with the remedy the more important factor. *Id.* at 2129. Although "monetary relief can be legal or equitable," the SEC's penalty was "designed to punish or deter the wrongdoer"

rather than restore the status quo, and thus was the "type of remedy at common law" to which the Seventh Amendment applied. *Id.* at 2129-30.

The Court then considered whether the SEC action fell within "a class of cases concerning what we have called 'public rights,'" a category the Court "first recognized" in 1856. *Id.* at 2132. Public rights concern matters that "historically could have been determined exclusively by the executive and legislative branches," *id.* (quoting *Stern v. Marshall*, 564 U.S. 462, 493 (2011) (brackets omitted)), even when they are "presented in such form that the judicial power is capable of acting on them," *id.* (quoting *Murray's Lessee*, 59 U.S. at 284). Such matters can be adjudicated by administrative agencies. *Id.* at 2132-33 (discussing cases involving immigration, foreign commerce, relations with Indian tribes, and the administration of public lands, in which the government sought legal remedies, including monetary penalties, in administrative settings).

After making clear that administrative officers can enforce penalties in areas "peculiarly within the authority of the legislative department of the Government," *id.* at 2133 n.1 (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)), the Court distinguished the regulation of areas in which "the political branches ha[ve] traditionally held exclusive power" from the regulation of "interstate commerce more broadly," *id.* at 2133. It stressed that the SEC's regulation of the securities markets was an area of private rights, rather than a

distinctively legislative domain. *Id.* at 2136 (emphasizing that "[t]he object of this SEC action is to regulate transactions between private individuals interacting in a pre-existing market").

In drawing that distinction, *Jarkesy* built on Supreme Court precedent illustrating that the political branches have "traditionally held exclusive power over [a] field" if their power was so complete that they could prohibit action in the field entirely. *See id.* at 2133 (citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 457 (1929)). In *Ex parte Bakelite Corp.*, for instance, the Court upheld a law that authorized the president to impose tariffs on goods imported by "unfair methods of competition." 279 U.S. at 446. The public rights doctrine covered the power to "lay and collect duties on imports," *id.* at 458, because, as the Court emphasized in *Jarkesy*, the political branches' power over tariffs was so total that "the law even authorized [the president] to 'exclude[] foreign goods entirely'" if the unfairness was extreme, *Jarkesy*, 144 S. Ct. at 2133 (quoting *Bakelite*, 279 U.S. at 446). The breadth of that authority illustrated that the "political branches had traditionally held exclusive power over th[e] field and had exercised it," so the public rights doctrine applied. *Id.*

Put another way, the public rights doctrine applies when Congress's power in an area is "so total that no party had a 'vested right'" to act in that area without Congress's approval. *Id.* at 2132 (quoting *Oceanic Steam*, 214 U. S. at 335). In

Oceanic Steam Navigation Co., for example, the Supreme Court upheld a statute permitting administrative officials to impose monetary penalties for violations of a prohibition against bringing certain noncitizens into the United States. 214 U.S. at 332. Cautioning against "the interference of the courts with the performance of the ordinary duties of the executive department[]," *id.* at 338 (quoting *Decatur v. Paulding*, 39 U.S. 497, 516 (1840)), the Court held that Congress could, "when legislating as to matters exclusively within its control," authorize executive officers to exact "reasonable money penalties . . . without the necessity of invoking the judicial power," *id.* at 339. As the Court recounted in *Jarkesy*, its holding rested on the fact that Congress's power in the area "was so total that no party had a 'vested right' to import anything into the country," making clear that administrative penalties in that area could be assessed without a jury. *Jarkesy*, 144 S. Ct. at 2132 (internal citations omitted).

Relatedly, the Supreme Court has upheld Congress's "power to condition issuance of registrations or licenses" on voluntary participation in a scheme in which rights are adjudicated outside of Article III. *Union Carbide Agric. Prods. Co*., 473 U.S. at 589. In *Union Carbide*, the Court held that a law requiring pesticide manufacturers to settle valuable claims outside of an Article III court was constitutional because it involved not a "purely 'private' right," but instead a regulatory program in which manufacturers voluntarily participated. *Id.* There,

the Court considered a statute that required manufacturers to submit research data to the Environmental Protection Agency concerning a pesticide's environmental effects before receiving a license to sell the pesticide. *Id.* at 571. The Act allowed subsequent registrants to rely on scientific data submitted by previous registrants and provided that subsequent registrants would have to compensate prior registrants for the use of their data. *Id.* at 573. If the registrants were unable to agree on compensation, the dispute would be arbitrated with limited judicial review. *Id.* at 575.

As the Supreme Court later explained, the producers in *Union Carbide* received a "valuable Government benefit"—a "license to sell dangerous chemicals"—in exchange for participation in the arbitration program. *Horne v. Dep't of Agric.*, 576 U.S. 350, 366 (2015) (internal quotations omitted) (distinguishing the regulation of licenses to sell pesticides, a "special governmental benefit," from the regulation of the sale of raisins). Because Congress used registrants' data to administer a public program in which manufacturers voluntarily participated in exchange for a benefit, the registrants' right to compensation for the data was not a "purely 'private' right." *Union Carbide*, 473 U.S. at 589; *see* Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 580 (2007) (contending that "public rights" extend to areas where the government distributes "mere privileges rather than core private rights," and explaining that

privileges do not generate "vested rights"); John Harrison, *Public Rights, Private Privileges, and Article III*, 54 Ga. L. Rev. 143, 198 (2019) (positing that the distribution of privileges or licenses puts the government "in the position of an owner, with a right to exclude and a power to give permission"). The fact that the scheme involved voluntary participants, rather than "unwilling defendant[s]," reduced the danger of encroachment on the Article III judicial powers to "a minimum." *Union Carbide*, 473 U.S. at 591.

* * *

In sum, in *Jarkesy*, the Supreme Court confirmed what it has long recognized: Congress can provide for executive adjudication when its power over an area is so exclusive that no vested rights are involved, such as when it distributes licenses or privileges in exchange for government benefits. Congress produced just such a program when it created the FDIC, as the next Section explains.

II. The Supervision of Federally Insured Banks Is an Area Where Government Control Is So Total that There Is No Vested Right to Participate.

The FDIC exists in an area "peculiarly within the authority of the legislative department of the Government." *Jarkesy*, 144 S. Ct. at 2151. This stems from the longstanding and unique public functions that federally insured banks serve and the voluntary nature of the federal deposit insurance program. The extensiveness of

the FDIC's powers over federally insured banks—which initially comprised only the all-encompassing power to end a bank's business and later included the power to impose penalties and issue orders like those in this case—makes this especially clear. Given the FDIC's authority over the banks that elect to receive deposit insurance, it can certainly dictate "the terms upon which a right to [operate a federally insured bank] may be exercised." *Oceanic Steam*, 214 U. S. at 335 (internal citations omitted).

A. At the Founding, when Congress created the Bank of the United States, lawmakers understood banks to be government instrumentalities, working to "expand the money supply on behalf of the government." Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 Vand. L. Rev. 951, 975 (2021). As Alexander Hamilton explained when advocating for a national bank, banks exercised a "right on behalf of the government" by creating the currency underlying the country's economy. Hamilton, *supra*, at 35; Menand, *supra*, at 981-82 ("[L]ike the members of Parliament who built the Bank of England, early U.S. officials viewed money creation as a prerogative of government."); *Schaake v. Dolley*, 118 P. 80, 83 (Kan. 1911) (describing the "banker" as "a trustee of the fiscal affairs of the people and of the state").

Lawmakers continued to reiterate the view that banking was a unique public enterprise when they passed additional banking legislation, long after Hamilton's Bank of the United States became the subject of political controversy and was allowed to expire. This was certainly true when Congress created the system of federal deposit insurance. In 1933, after the Great Depression had accelerated political agitation for "strict supervision of . . . banking," Menand, *supra*, at 1004 (quoting Franklin Delano Roosevelt's inaugural address), Congress created the FDIC. *See* Banking Act of 1933, Pub. L. No. 73-66, § 101, 48 Stat. 162, 168 (recodified into the FDI Act in 1950). The FDIC was a corporation authorized to provide deposit insurance to banks and to pay up to $2,500 to depositors in insured banks if those banks failed. *Id.*

As lawmakers explained, the FDI Act represented a "deal" between banks and the federal government. Banks would enjoy "the benefit of . . . insurance protection, with all the commercial advantages and stability that this protection might bring," while the federal government would be entitled to protect the federal insurance funds by subjecting the banks to close regulatory scrutiny. Baxter, *supra*, at 23. For example, the FDIC's board had the power to appoint examiners to inspect "any insured State nonmember bank . . . whenever in the judgment of the [board] an examination . . . is necessary." *See* Banking Act of 1935, Pub. L. No. 74-305, § 101(k)(2), 49 Stat. 684, 693. The FDIC could also "discontinue the

insurance of banks which offend against sound policies, and . . . dismiss them from the privileges" of FDIC membership. 79 Cong. Rec. 11,776 (1935) (Sen. Carter Glass); *see* Banking Act of 1935, § 101(i)(1)-(2), (l), 49 Stat. at 692-98 (giving the FDIC the power to terminate the insurance of federally insured banks upon report of "unsafe or unsound practices in conducting the business of the bank" or if the bank itself "is in an unsafe or unsound condition," and to act as receiver of failed banks). It was also given the right to facilitate an insured bank's merger or consolidation with another insured bank, if the merger would "reduce the risk or avert a threatened loss to the [FDIC]." *Id.* § 101(n)(4), 49 Stat. at 701; *see generally* FDIC, *A Brief History of Deposit Insurance in the United States* 26-27 (1998) (noting that this initially temporary power was later made permanent).

While Congress required banks that selected a national charter to be insured, federal law allowed state-chartered banks to decide whether to apply for FDIC insurance. *See* Banking Act of 1935, § 101(e)(2), (f)(2), 49 Stat. at 689-90. A state bank's application for insurance was subject to "approval by the [FDIC's] board of directors," which was instructed to consider a variety of criteria, including the bank's "financial history and condition," the "adequacy of its capital structure," and the "general character of its management." *Id.* § 101(e), (f), (g).

Because the soundness of the federal insurance fund was a "matter[] exclusively within [Congress's] control," *Oceanic Steam*, 214 U.S. at 339,

lawmakers endowed the FDIC with supervisory powers to help the corporation "protect" its insurance fund against losses, 79 Cong. Rec. 11,776 (1935) (Sen. Carter Glass); *see* Heidi Mandanis Schooner, *Fiduciary Duties' Demanding Cousin: Bank Director Liability for Unsafe or Unsound Banking Practices*, 63 Geo. Wash. L. Rev. 175, 190 (1995) (describing statutory history suggesting that "violations of safety and soundness must involve a risk to the federal bank insurance fund"). After all, the FDIC's insurance fund came from federal money in addition to banks' insurance premiums. The capital necessary to establish the FDIC was provided by the United States Treasury and the 12 Federal Reserve Banks, and the FDIC had—and still has—the authority to borrow money from the Treasury to cover any losses. FDIC, *supra,* at 28, 38, 55.

Furthermore, the integrity of the FDIC's insurance program was intimately tied to the health of the economy, underscoring the fact that the federal insurance program was a unique governmental prerogative. The FDI Act was rooted in Congress's desire to protect the economy and provide a stable currency in the form of bank deposits. *See* Flood, *supra,* at 65; *see generally* Gerald Corrigan, *Are Banks Special?*, Minneapolis Fed. Rsrv. Bank (Jan. 1, 1982), https://www.minneapolisfed.org/article/1983/are-banks-special (positing that deposit insurance "reflects a long-standing consensus that banking functions are essential to a healthy economy" and describing banks' unique role as "the

transmission belt for monetary policy"). Supporters of the deposit insurance plan emphasized that insurance would "stabilize the medium of exchange and promote a renewed expansion of bank credit," Flood, *supra*, at 62, goals that would be "indispensable to the support of business and the successful financing of the Treasury," *id.* at 66 (quoting Rep. Steagall); *FDIC v. Phila. Gear Corp.*, 476 U.S. 426, 433 (1986) ("[T]he purpose of the [FDI Act] is to ensure that the community is saved from the shock of a bank failure, and every citizen has been given an opportunity to withdraw his deposits." (quoting Rep. Steagall)); George Selgin, *The New Deal and Recovery, Part 27: Deposit Insurance*, Cato at Liberty (Mar. 28, 2023), https://www.cato.org/blog/new-deal-recovery-part-27-deposit-insurance (describing the view that deposit insurance is an element of "monetary or . . . macroeconomic[] policy, rather than one of mere redistribution").

B. While the FDIC always had the power to revoke a bank's federal insurance, Congress gradually enabled the FDIC to issue more tailored—and less economically devastating—sanctions, including penalties against individual bank directors or officers. As it did this, Congress emphasized that the FDIC should use these powers to safeguard the federal insurance fund. These features of the FDIC's history highlight the extensiveness of its power over the area of federally insured banks, underscoring that the regulation of those banks is one of the "ordinary duties of the executive department," *Decatur*, 39 U.S. at 516.

For much of the nation's history, although federal law gave banking agencies the awesome power to revoke a bank's charter or terminate its insurance, regulators were still unable to protect the public from bank failures because the banks were, in essence, too big to fail. That is, the power to revoke a bank's insurance would, if used, "assure the swift demise of the institution," making it too "extreme and inflexible to be of any real use." Stephen K. Huber, *Enforcement Powers of Federal Banking Agencies*, 7 Ann. Rev. Banking L. 123, 129 (1988). Over the years, regulators advocated for more moderate regulatory powers, including the power to remove a bank's officers and directors. *See* 1 *Annual Report of the Comptroller of the Currency* 42 (1892) (noting that the power to revoke a bank's charter was "so severe as to render it nugatory"); 1 *Annual Report of the Comptroller of the Currency* LVI (1884) ("In [the case of an officer's exceeding loan limits] the Comptroller has no means of enforcing the law, except by bringing a suit for forfeiture of charter, and this course might result in great embarrassment to business, as well as loss to many innocent stockholders of the banks.").

Gradually, legislators became convinced that existing remedies had "proven inadequate" and "cumbersome" and gave the banking agencies new tools to enable them to "move quickly and effectively to require adherence to the law." *See* S. Rep. No. 89-1482 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3532. In 1966,

Congress gave federal regulators the power to issue cease-and-desist orders against banks to target unsafe or unsound practices, as well as to temporarily suspend and permanently prohibit directors, officers, and other bank managers from "further participation in any manner in the conduct of the affairs of the bank" in certain circumstances. Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 202, 80 Stat. 1028, 1046-49. These orders were "intermediate remedies" that would permit administrators to prevent substantial injury to "the Nation's financial institutions" and protect the "interests of the Government which underwrites the insuring agencies," without terminating a bank's insurance or appointing a bank receiver. S. Rep. No. 89-1482, *supra,* at 3545, 3533-34. To best balance these goals with the need to reduce the "danger of abuse" of agencies' powers, Congress required agencies to provide banks and bankers with an administrative hearing and limited judicial review. *Id*. at 3557 (describing 12 U.S.C. § 1818(h)(1)).

Following a series of bank failures in the 1970s, Congress concluded that banking agencies needed even more nuanced enforcement powers. Huber, *supra*, at 141-42; Elmer B. Staats, *Report to the Congress by the Comptroller General of the United States: Highlights of a Study of Federal Supervision of State and National Banks* 5 (1977) (describing 42 bank failures from 1971-1976). In 1978, Congress gave the FDIC the power to impose limited civil monetary penalties

against banks, and to impose penalties or cease-and-desist orders against individual officers, directors, employees, or agents of banks. Financial Institutions Regulatory and Interest Rate Control Act ("FIRIRCA") of 1978, Pub. L. No. 95-630, § 107, 92 Stat. 3641 (providing power to the FDIC in the context of officers or affiliates of insured banks).

Once again, these remedies were designed to give the agency the flexibility to avoid imposing harsher penalties against institutions as a whole. H.R. Rep. No. 95-1383, at 17 (1978) ("Presently, an agency is often faced with the option of having to ignore a violation or imposing a penalty it often considers to be overkill."); *id.* (describing regulators' requests for "powers which lie somewhere between" "asking for voluntary cooperation" and "using a blunderbuss on the institution"). Regulators and lawmakers hoped that these penalties would help them "tailor solutions and responses to specific problems" affecting the safety or soundness of the banks. *Id.* (describing Congress's desire to give "agencies the opportunity to move against individuals . . . acting in a manner which threatens the soundness of their institution"); Staats, *supra*, at 14 (noting that the ability to impose a penalty on bank officials "could have been helpful in dealing with the officials of [recently failed] banks").

In 1989, Congress again revised the authorities of federal banking agencies, reaffirming the relationship between these penalties and the need to protect both

the economy and the federal insurance fund. After a series of bank failures known as the savings and loan crisis, Congress gave banking regulators the additional authority to levy penalties against not only directors and officers, but also other "institution-affiliated parties," including controlling stockholders, consultants, lawyers, and accountants who "engaged or participated" in unsafe, unsound, or illegal conduct. Federal Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 204, 103 Stat. 183, 446, 453; *id.* § 901 (making changes applicable to banks with federal insurance). As when enacting FIRIRCA, lawmakers understood that the ability to institute these penalties would reduce "activities . . . that pose unacceptable risks to the federal deposit insurance funds," thereby "put[ting] the Federal deposit insurance funds on a sound financial footing for the future." H.R. Rep. No. 101-222, at 393 (1989) (Conf. Rep.).

* * *

In short, the FDI Act implements a voluntary scheme in which federally insured banks perform key public functions, and the FDIC's power to penalize bankers complements these public functions by ensuring that the corporation can protect the health of the insurance fund. Because of these aspects of the FDIC's regulatory scheme—features that are significantly different than those the Court considered in *Jarkesy*—the public rights doctrine applies, and the FDIC can issue orders and fines without Article III adjudication, as the next Section explains.

III. The FDIC's Imposition of Penalties and Other Orders on Banks and Bankers Does Not Require Adjudication by an Article III Court.

As this history makes clear, the regulation of federally insured banks is an area in which the power of the "political branches" is long-standing and has traditionally been "exclusive," making the public rights doctrine applicable. *Jarkesy*, 144 S. Ct. at 2133.

In supervising banks and their officers, the FDIC is not regulating "transactions between private individuals interacting in a pre-existing market." *Id.* at 2136. Rather, the government acts as an insurer or even "in the position of an owner," Harrison, *supra*, at 198, distributing valuable benefits—the government-backed assets in the FDIC's insurance fund—and protecting those assets accordingly. This is why the "risk" of damage to "the agencies administering the insurance funds" factors into the assessment of which banking practices should be prohibited. *See Gulf Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 651 F.2d 259, 264 (5th Cir. 1981) (interpreting the prohibition on "unsafe or unsound" practices); Schooner, *supra*, at 190. The FDIC's supervisory powers allow it to protect its own funds, facilitating an "ordinary dut[y] of the executive department" rather than more generic regulation of the economy. *Decatur*, 39 U.S. at 516.

Furthermore, Congress's power over banking is completely different than its power to regulate "private" securities transactions. *Jarkesy*, 144 S. Ct. at 2136. The architects of the nation's banking system envisioned banking as "not a mere

matter of private property, but a political machine of the greatest importance to the state." Hamilton, *supra*, at 30. When enacting federal banking laws, Congress made clear that banks performed unique federal functions. That is why members of Congress, when creating the FDIC and empowering it to seek penalties, referred to Congress's powers to borrow and coin money. *See* 112 Cong. Rec. 24,983 (1966) (Rep. Wright Patman) (noting that Congress was "carrying out [its] mandate under article I, section 8, clause 5, of the Constitution to assure the public of a sound monetary system" when creating the penalties in 12 U.S.C. § 1818); Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. Chi. L. Rev. 1361, 1396-97 (2021) ("Congress based its legislative authority on the Constitution's monetary provisions rather than on the Commerce Clause"); *cf. Spawn*, 989 F.2d at 837 (describing "the FDIC's role of stabilizing and promoting confidence in the national banking system").

These features explain why Congress's power over federally insured banks, like its power over immigration or foreign trade, is "total" within the meaning of *Jarkesy*, 144 S. Ct. at 2132 (internal citations omitted). The government has always had the power to revoke a bank's federal insurance entirely. Indeed, the FDIC's power to impose penalties developed as a replacement for its "'death-penalty' powers" to revoke a bank's insurance or put it in receivership. Baxter, *supra*, at 25. Because the political branches have always been able to "directly"

prohibit banks from receiving federal insurance, they can certainly dictate "the terms upon which a right to [operate a federally insured bank] may be exercised." *Oceanic Steam*, 214 U. S. at 335 (internal citations omitted). This is why the FDIC—in stark contrast to the SEC—has *always* issued penalties exclusively in administrative proceedings. *Jarkesy*, 144 S. Ct. at 2126; *see Akin v. Off. of Thrift Supervision Dep't of Treasury*, 950 F.2d 1180, 1186 (5th Cir. 1992) (rejecting Seventh Amendment challenge to reimbursement order under 12 U.S.C. § 1818(b)).

Put another way, national banking involves "mere privileges," Nelson, *supra*, at 580, rather than "vested right[s]," *Jarkesy*, 144 S. Ct. at 2132 (internal citations omitted). Indeed, like the regulated businesses in *Union Carbide*, FDIC-insured banks are "voluntary participants" in a complex regulatory scheme, rather than "unwilling defendant[s]." 473 U.S. at 489-91. Federal law does not require state-chartered banks like Burgess's to obtain deposit insurance, and by electing to receive the benefits of federal insurance, federally insured banks receive a "valuable Government benefit" in exchange for participation on the government's terms. *Horne*, 576 U.S. at 366 (internal quotations omitted); *Fahey*, 332 U.S. at 256 (describing "the right to conduct a public banking business" as a "privilege" that requires adherence to "limitations intended for public protection"). As the Supreme Court has instructed, this type of program simply does not implicate

"purely 'private' right[s]" that require adjudication by Article III courts. *Union Carbide*, 473 U.S. at 589.

* * *

Almost a century ago, Congress authorized the FDIC to provide valuable federal benefits in exchange for supervision that would protect the nation from financial panics. Participants in this type of program enjoy no "vested right[s]" to these benefits, *Jarkesy*, 144 S. Ct. at 2132 (internal citations omitted), and the FDIC can assess—and long has assessed—penalties against them "without providing an Article III adjudication," *Union Carbide*, 473 U.S. at 589. No court has ever held that the Seventh Amendment is implicated in this context, and this Court should not do so either.

CONCLUSION

For the foregoing reasons, this Court should reject Burgess's claim that the FDIC's adjudication of penalties and prohibition orders violates the Seventh Amendment.

Respectfully submitted,

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Dated: November 21, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November 2024, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: November 21, 2024

/s/ Brianne J. Gorod
Brianne J. Gorod

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,555 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Dated: November 21, 2024.

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